PROGRESS OF THE LAW.

As Marked by Decisions Selected from the Advance Reports.

AGENCY.

Undisclosed Principal, Set-off Against Agent

It is a well-known rule of law that if the owner of goods entrusts them to an agent with power to sell in his own name, without disclosing the name of his principal, and the agent sells in his own name to one who knows nothing of any principal, but honestly believes that the agent is selling on his own account, the purchaser may set-off any demand he may have on the agent against the demand for the goods made by the principal. But this rule is only to be applied where the purchaser has no reason to suspect the existence of an unknown principal. Where, as in the present case, the character of the selling was equivocal, and, as was known to the purchaser, the agent was in the habit of acting sometimes on his own account and sometimes for an unknown principal, it was incumbent for the purchaser, in order to avail himself of his right of set-off against the principal, to inquire in what character the agent was acting in this particular transaction. Since he neglected to take this precaution, and, as it proved, that the agent was acting for an undisclosed principal in this instance, the purchaser's right of set-off against the latter was gone: *Baxter et al.* v. *Sherman et al.*, 76 N. W. (Minn.) 211.

BANKS AND BANKING.

Taxation, Exemption, Bank, Surplus

The laws of 1896 of New York exempted from taxation "the deposits in any bank for savings which are due depositors." In *People ex rel.* v. *Peck*, 50 N. Y. Suppl. 820, the question arose whether the exemption extended to surplus funds accumulated under the Banking Law of 1892 "to meet any contingency or loss in the business from the depreciation of its securities or otherwise." The Supreme Court, after a review of cases upon the subject, decided that such accumulations formed part of the debt due depositors, and were, consequently, not taxable.

BILLS AND NOTES.

Action was brought May 13, 1895, to foreclose a morgage, by reason of alleged default in the payment of interest on the following promissory note: "August 7, 1893—Two years after date we promise to pay to the order of H. F. M. one hundred dollars . . . and interest from date at the rate of 6 per cent. per annum; and, if interest be not paid annually, to become as principal, and bear the same rate of interest. . . . H. M. M. and M. A. M." Held, (1) that in the absence of a specific promise to pay the interest at a time different from that fixed for the payment of the principal, the principal and interest both became due at the same time, and (2) that the provision, "if interest be not paid annually, etc.," did not amount to a promise to pay the interest annually; and that, therefore, since there was no default, the action was prematurely brought: *Motsinger et ux.* v. *Miller*, 53 Pac. (Kan.) 869.

Interest, Time of Payment

A Michigan statute (How. Ann. St. § 632) makes the certificate of protest of a note by a notary *prima facie* evidence of protest. Upon suit against an indorser the following certificate was offered: "United States of America, State of New York, ss.: I, Henry Wheeler, Notary Public, do hereby certify that I have this day duly protested for non-payment the annexed bill. H. Wheeler, Notary Public. (Seal.) Troy, December 14, 1896." Held, that the certificate was insufficient in that it did not state the place and manner of the demand: *Un. Nat. Bank* v. *Wins. Milling Co.*, 76 N. W. (Mich.) 1.

Protest, Certificate, Sufficiency

CARRIERS.

In Indiana the rule prevails that the special liability of a common carrier remains attached to a railroad after the arrival of baggage at its destination until the owner has reasonable time and opportunity to claim and remove it. If such baggage is not claimed within a reasonable time the liability of the carrier becomes that of a warehouseman. No notice of the arrival of the baggage need be given. Therefore, when a trunk was stored for six days in the warehouse of the railroad, which was neither fire-proof nor burglar proof, but was of reasonably safe construction, and the owner did not call for it until after it had been stolen (which happened

Arrival of Goods at Destination, Notice, Liability for Loss

CARRIERS (Continued).
on the seventh day), the railroad was not liable: *I. D. & W. R. R.* v. *Zilly*, 51 N. E. (Ind.) 141.

The efforts of the Interstate Commerce Commission to give effect to the remnants of the Act have received another set back. The Western & A. R. Co. charged $1.07 per 100 lbs. for carriage from Cincinnati to Atlanta, while to Marietta, twenty miles nearer than Atlanta, $1.27 was charged. The contention of the plaintiff was, of course, that this discrimination was a violation of the "long and short haul" clause, while the defendant argued that, as the 4th section of the act prohibiting greater charges for a long than a short haul, applied only when the transportation was under "substantially similar circumstances and conditions," such difference in charges was proper here. In support of this, the defendant showed that there was strong competition at Atlanta both by rail and water, whereas, at Marietta no such rivalry existed. Under the decision in the case of *Interstate Commerce Commission* v. *Alabama M. Ry.*, 168 U. S. 144 (1897), it is settled that the existence of competition of controlling force at one point and its absence at another, creates such a dissimilarity of conditions as to render section 4 inoperative. This decision, however, said counsel for the plaintiff, still left open in each case the question whether the dissimilarity caused by the competition was of such extent as to make the difference in rate complained of, reasonable, quoting Judge Severns, in *Interstate Commerce Commission* v. *E. T., V. & G. R. Co.*, 85 Fed. 107 (1898), as follows: "If dissimilarity is found, then the further question arises whether the dissimilarity is so great as to justify the discrimination which is complained of." The court, however, refused to coincide with the view quoted and held that any substantial dissimilarity in conditions rendered the 4th section inapplicable without further question as to whether the discrimination was not more than commensurate, quoting with approval the late Judge Cooley in *In re L. & N. R. Co.*, 1 Interst. Comm. Com. R. 57. "If the circumstances and conditions of the two hauls are dissimilar, the statute is not violated." Any such questions, under this view, must be raised under other sections of the act: *Interstate Commerce Commission* v. *Western & A. R. Co.*, 88 Fed. 186.

Interstate Commerce Act, Long and Short Haul, Dissimilar Conditions

The attempt of a carrier to shift liability for injuries to passengers from its own shoulders to those of independent con-

CARRIERS (Continued).

Independent Contractor, Liability for Acts of Servants

tractors was frustrated in *Barrow S. S. Co.* v. *Kane*, 88 Fed. 197. A engaged passage on defendant's line from Londonderry to New York from X, the agent at Londonderry. X, on his own account, operated a steam tender to carry passengers from the wharf at Londonderry to the steamer at the mouth of the river. While on the tender A was assaulted by agents of X, and he brought suit against the steamship company therefor. The latter contended that it was not liable, since the act complained of was committed by the agents of an independent contractor. But the court considered that this case was governed by the rule which holds liable a railroad company for acts committed by the servants of a sleeping-car company operating on its lines.

CONSTITUTIONAL LAW.

The clause embodied in the Federal and most state constitutions, prohibiting the deprivation of a person's liberty without due process of law, which seems to be a never-dying source of inspiration, though its invocation is not attended with uniform success, has again come to the fore. A commission to take a deposition having been issued out of Colorado to a notary in New York city, a subpœna was obtained directing the relator to appear before the commissioner, and for failure to obey to be guilty of contempt. The relator, having refused to answer questions and, at the instance of the notary, having been committed to prison, application was made for a discharge on the ground that the prisoner was deprived of his liberty without due process. The court, being of the opinion that the power to commit for contempt should be jealously guarded, and that the commissioner, even though he was also a notary, had no such power, ordered the relator's discharge: *People ex rel. McDonald* v. *Leubischer* (S. C. N. Y.), 51 N. Y. Suppl. 735.

Deprivation of Liberty without Due Process, Foreign Commission

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CONTRACTS.

The case of *Place* v. *Conklin*, 51 N. Y. Suppl. 407, is interesting as an example of the summary manner in which the courts deal with transactions violating public policy. A, a very old man, told B, his friend, that if he could get a satisfactory housekeeper he would marry her and give her $500 for herself. B thereupon

Public Policy, Illegality

CONTRACTS (Continued).

introduced C, his cousin, to A, and an engagement followed, A agreeing to deed his house to C, in addition to $500. C, without A's knowledge, agreed to give B for his services $500 and a mortgage for $3500 on the house when it should become hers. This she actually did after the marriage; but A, learning of it, brought a bill to have a reconveyance of the property made to himself, clear of any liens. The court granted the relief prayed, but laid stress on the fact that his wife did not object to the reconveyance, intimating that, if she had objected, the result might be different.

CRIMINAL LAW.

Practice of Medicine, Christian Scientists

The Christian Scientists have recently won a victory in the Supreme Court of Rhode Island. A statute of that state, General Laws 165, § 2, renders it illegal for any person to "practice medicine" without having obtained the proper certificates, etc. Held, that the methods of attempted cure employed by the Christian Scientists—such as prayer, meditation, etc.—are not included within the term "practice of medicine:" *State* v. *Mylod*, 40 Atl. 753.

DAMAGES.

Construction of Bond, "Damage and Loss"

DeCamp v. *Bullard*, 50 N. Y. Suppl. 807 (Supreme Court). The owner of a stream enjoined owners of land higher up from floating logs down past his premises. The court dissolved the injunction, upon the owners of the logs giving a bond, with sureties, conditioned to pay "any and all *damage and loss* whatsoever . . . sustained by the plaintiff" during the floating of the logs. In a suit on the bond the plaintiff showed no damage to his premises, but claimed that the terms of the bond allowed him toll and the fair and reasonable value of the use of the stream, and the court upheld that construction of the words "any and all damage," etc.

Death, Verdict, Inadequacy

By a vote of three judges against two, the New York Supreme Court has decided that inadequacy is a proper ground for the trial judge setting aside a verdict under the following circumstances. The plaintiff's intestate, who met his death through the negligence of the defendant, had been a day laborer, in good health, earn-

DAMAGES (Continued).

ing two dollars per diem, and charged with the support of a wife and four children, the oldest of whom was eleven years of age. The verdict for the plaintiff was for one thousand dollars: *Connor* v. *Mayor, Etc., of New York City*, 50 N. Y. Suppl. 972.

DECEDENT'S ESTATES.

In re Fidelity Loan, Etc., Co., 51 N. Y. Suppl. 1124. In this case, in the Surrogate's Court, it appeared that the executors of an estate, which owned more than one-half the stock and bonds of a railroad, claimed credit for twenty-five hundred dollars, one-half the salary of the vice-president. This item was contested on the ground that that officer was one of the executors. The facts shown were that the salary of the executive had always been five thousand dollars; that, on the retirement of the former president, the executors, one of whom was a trust company, elected, by their majority of stock, an officer of this company vice-president, and that he was paid the salary formerly paid the president, as he discharged all the duties formerly belonging to the president. The court being of the opinion that the duties of managing a railroad did not come within the scope of an executor's duties, and being satisfied that the estate had not been injured by the arrangement, decided that the "rule that the law does not permit a trustee to assume relations inconsistent with his trust, does not seem to have any application to these facts."

Executor, Advantage from Position, Election to Office

Land was sold at a judicial sale, but before the sheriff made a deed to the purchaser, the latter died. Held, that an order of the court confirming the sale would not be set aside, since the death of the purchaser did not avoid it, and his rights could be asserted by his heirs or personal representatives: *Cronkhite* v. *Buchanan*, 53 Pac. (Kan.) 863.

Judicial Sale, Death of Purchaser

EQUITY.

Standard Fashion Co. v. *Siegel-Cooper Co.*, 50 N. Y. Suppl. 1056, held to the rule that where equity will not grant specific performance of a contract because it involves the doing of continuous acts, neither will it grant an injunction to prevent acts expressly stipulated against in the contract. The case of *Lumley* v. *Wagner*, 1 DeG., M. & G. 604 (1852), was referred to, but classed among the exceptions to the rule illustrated by the principal case.

Injunction, Continuous Acts

EVIDENCE.

A statute of New York makes it unlawful for an auctioneer to knock down articles to fictitious bidders. An auctioneer being indicted under this act, it appeared that the only evidence properly admissible before the grand jury was that the defendant had sold some plates to the name of "Lohring," and that later one of these plates was delivered at defendant's house. It was held that such evidence was not sufficient to support an indictment, since the "presumption of innocence prevails as much in the grand jury room as elsewhere, and the evidence before that body must be such as to clearly overcome that presumption, before an indictment can be properly found:" *People* v. *Lindenborn*, 52 N. Y. Suppl. 101.

Grand Jury, Presumption of Innocence

A new trial will not be granted because of after-discovered evidence unless there are peculiar facts which show that an injustice will be committed by refusing it. Thus, when the defendant had been convicted of murder and a new trial had been refused, which was applied for on the ground of newly discovered evidence relating to the defence (an alibi), the Supreme Court of Idaho said: "Such evidence being in direct line with the whole theory of the defence, proper diligence required the defendant to produce such evidence at the trial. It was in his power to do so. A new trial was properly denied on this ground. A new trial should never be granted on the ground of newly discovered evidence when such evidence is merely cumulative, nor when the alleged newly discovered evidence was easily within the reach of defendant and could, with reasonable diligence, have been produced at the trial. To grant a new trial on such grounds would not be subservient to the public good, but would, on the other hand, encourage a careless and loose preparation by the defendant of his defence:" *State* v. *Davis*, 53 Pac. 678.

Newly Discovered Evidence, New Trial

In a prosecution for rape there was offered in evidence a copy of a magazine sent by the defendant to the prosecutrix. Certain words in the magazine were marked and dotted, so that when arranged in proper order by an expert, they formed intelligible sentences on matters relevant to the issue. Held, that the magazine in this form was practically a letter and was admissible: *State* v. *Wetherell*, 40 Atl. (Vt.) 728.

Writing, Peculiar Form

HUSBAND AND WIFE.

Divorce, Cause, Venereal Disease

The Supreme Court of Pennsylvania, following the general current of decisions, has decided that a divorce will be granted to a wife when it appears that her husband is infected with syphilis, and cohabitation with him is dangerous, and it is no excuse for him to plead that the disease was communicated to the wife before marriage. The case falls within the statute permitting divorce, Mar. 13, 1815, 6 Sm. L. 286, 1 P. & L. Dig. 1638, "when any husband shall have by cruel and barbarous treatment endangered his wife's life, or offered such indignities to her person as to render her condition intolerable and life burdensome and thereby force her to withdraw from his house and family:" *McMahon* v. *McMahon*, 40 Atl. 795.

INNKEEPERS.

Hotel, Dining-Room, Guest, Liability

The Queen's Bench Division of England has recently decided that the relationship of innkeeper and guest exists between the proprietor of a hotel and a person who comes in to take a meal in the dining-room. In this case plaintiff made use of the hotel merely as a restaurant, without any intention of lodging there, but the proprietor was held liable for the loss of his overcoat which was stolen while in the dining-room, on the ground that plaintiff was a technical "guest," and the proprietor an "innkeeper:" *Orchard* v. *Bush* [1898], 2 Q. B. 284. (See note in this issue.)

INSURANCE.

Burglary, Insurance, "Actual, Forcible and Violent Entry"

A policy of insurance against burglary contained a promise to indemnify the assured under the following condition: "if the property above described, or any part thereof, shall be lost by theft following upon actual, forcible and violent entry upon the premises wherein the same is herein stated to be situate, etc." The door of the shop in which the insured goods were stored was neither locked nor bolted, and a thief gained access to the goods, which he stole, by merely turning the handle of the door.

In a suit on the insurance policy, the English Court of Queen's Bench Division held that the entry through the door, above described, was an "actual, forcible and violent" entry within the terms of the policy: *In re G. & G., Etc., Ins. Co.* [1898], 2 Q. B. 136.

INSURANCE (Continued).

In *Trinder, Anderson & Co.* v. *T. & M. Ins. Co.* [1898], 2 Q. B. 123, a ship's cargo was insured, the master of the ship being one of the insurers. The cargo having been lost through the negligence of the master, suit was brought by him, together with the other owners, against the insurance campany.

Marine Insurance, Negligence of Master, Loss, Recovery

The Court of Appeal of England held that the mere fact that the master's negligence caused the loss would not prevent a recovery by him on the policy. "That the negligent navigation of a ship by a person other than the assured affords no defence to an action upon a policy of marine insurance against perils of the sea when the loss is immediately occasioned by a peril of the sea is clear, the reason, in my opinion, being that what is insured against is a peril of the sea, which is none the less a peril of the sea, though brought about by negligent navigation. Is there, then, any warranty by a part owner, if he be one of the assured, that he will not personally be guilty of negligent navigation during a voyage covered by the policy? We are not dealing with a loss brought about by the wilful act of the assured. Negligent navigation has never been held equivalent to 'dolus,' or the 'misconduct' which is spoken of by Lord Campbell in *Thompson* v. *Hopper*, 2 B. & Ad. 73 (1813)." (Per Smith, L. J.)

Solomon v. *Continental Fire Ins. Co.*, 50 N. Y. Suppl. 922, affords a very liberal interpretation of the clause in a policy that in case of fire the insured should give "immediate notice" to the insurer. In this case the policy was in a safe which remained in the ruins for six days, but the policy itself was not recovered for about fifty days, having become mislaid after its removal from the safe with other papers. As the plaintiff was merely an assignee of the policy and ignorant of the company's name, he was unable to give notice till the recovery of the document. The insurance company had, in the meantime, received actual notice of the loss, but not through the plaintiff. The Supreme Court affirmed the decision of the referee that "defendant received sufficient notice of the loss of the plaintiff within the requirements of the condition of the policy."

Notice of Loss, Excuse for Delay

LANDLORD AND TENANT.

Drago v. *Mead*, 51 N. Y. Suppl. 360 decided that in a suit

LANDLORD AND TENANT (Continued).

Covenant to Repair, Damages, Loss of Profits

by a lessee of a store against the lessor for failure to make repairs, the loss of profits incurred through lessee's alleged inability to carry on business in consequence of the lack of repair, can form no part of the damages, the court saying: "Such damages, if recoverable at all, are recoverable only where the tenant is not only unable to carry on his business on the demised premises, but where his eviction from the demised premises prevents him from carrying on business at all."

Holding Over, Lease to Firm

In *Mason* v. *Tietig*, 52 N. Y. Suppl. 249, it appeared that a lease had been made to a firm for a year; that the firm had ended, and one of its members held over after the expiration of the year. The landlord endeavored to hold him as a tenant for a year under the terms of the lease to the firm, but it was held that "It is true that, when a tenant, under a lease for a year, holds over after the expiration of the year, he may, at the election of the landlord, be held as a tenant for another year under the terms of the lease. But that is not this case. The defendant was not tenant under the original lease. That he was a member of the firm who were the tenants has no effect whatever. As he was not the tenant under the lease he could not be deemed to hold over under the lease."

LIBEL.

Identification of Parties Libelled, Evidence

The New York Court of Appeals, by a vote of four to three, affirmed a verdict of $4000 for a libel which charged bribery, etc., upon some one referred to, vaguely, as "the London head of a large New York firm of cloth jobbers." To assist the jury in identifying plaintiff as the person intended by this language, evidence was admitted of articles published in three other newspapers, of the same general purport, but referring to plaintiff by name. These papers had printed the articles the morning before election, and the defendant's alleged libel appeared in the afternoon of the same day. The opinion of Bartlett, J., dissenting, cites *Bourke* v. *Warren*, 2 Car. & P. 307 (1826), in which it was said, "if witnesses, who state that they understand that the plaintiff is the person, also say that they were enabled so to understand by the perusal of another libel, with which the defendant had no concern, their evidence ought to be laid out of the case." The majority are content with referring to Odgers, Sland. & L., p. 467; Newell, Defam., p. 767: *Van*

LIBEL (Continued).

Ingen v. *Mail & Express Pub. Co.*, 50 N. E. 979. Martin, J., with whom concurred Parker, C. J., and Gray and O'Brien, J.J. Bartlett, Haight and Vann, J.J., dissented.

NEGLIGENCE.

Contributory Negligence, Co-employes

The Supreme Court of Indiana, in *Abbitt* v. *Lake Erie & W. Ry. Co.*, 50 N. E. 729 (Jordan, J., with Howard and McCabe, JJ., dissenting), decides that where two co-employes of a railroad are so situated that it becomes the duty of one to look out and give notice of approaching trains, the relation of principal and agent is created; and if on account of negligence in the performance of this duty, injury results by act of a third party not a fellow servant, such negligence in legal contemplation would be the negligence of the injured one, and justly imputable to him. The court allows that the rule of *Thorogood* v. *Bryan*, 8 C. B. 115, has been repudiated in most jurisdictions, but asserts that a clear case of principal and agent was made out in this instance. The dissenting opinion of Howard, J., protests vigorously against the assumption that "persons so engaging together at work are mutual agents of one another." For discussions of this subject see *Minster* v. *Ry. Co.*, 53 Mo. App. 276 (1893); *Puterbaugh* v. *Reasor*, 9 Ohio, 484 (1859); *Griffith* v. *R. Co.*, 44 Fed. 574 (1890); *Schon* v. *Staten I. E. R. Co.*, 45 N. Y. Suppl. 124, and cases cited in 7 Am. & Eng. Ency. Law (2d Ed.) 445.

Electric Car, Riding on Platform, Negligence Per Se

In *Watson* v. *P. & C. Rwy.*, 40 Atl. 699, the Supreme Judicial Court of Maine decided that it is not negligence *per se* for a passenger to ride on the platform of an electric car, but that the question of his contributory negligence, if he is injured, is to be determined as in any other case.

It was claimed that while the above rule was applicable to horse cars, yet that the opposite rule, which is enforced in the case of steam railroads (*Goodwin* v. *R. R.*, 84 Me. 203 (1891)), should be applied to the case of electric cars. In answer to this the court said: "An electric car is still a street car, and, in our opinion, the conditions, especially with respect to riding upon platforms, are more similar to those of the horse street car than those of a railroad train upon a steam railroad. It is a notorious fact that steet railroad companies whose cars are propelled by electricity constantly accept and

NEGLIGENCE (Continued).

invite passengers to ride upon the platforms of their cars when there is no room inside, and that persons having occasion to use such cars are frequently glad for even a foothold upon the platform, step or footboard. Neither carrier nor public have regarded the street car platform as a known place of danger, and we are not disposed to say, as a matter of law, that a passenger who rides upon the platform of an electric car is thereby guilty of contributory negligence . . . . Such is the conclusion that many of the courts of this country have arrived at: *Elliott* v. *Rwy.*, 18 R. I. 707 (1892); *Pray* v. *Rwy.*, 44 Neb. 167 (1895); *Wilde* v. *Rwy.*, 163 Mass. 533 (1895); *Reber* v. *Traction Co.*, 179 Pa. 339 (1897)." Per Wiswell, J.

Evidence, Presumption, Electric Wires

The Supreme Court of Missouri has lately, in accordance with the weight of authority, applied the rule of *res ipsa loquitur* to the case of broken electric wires. In *Garmon* v. *Laclede Gaslight Co.*, 46 S. W. 968, it was held that the mere fact that a wire, maintained by the defendant company, broke and fell into the street, and plaintiff's intestate, stepping on it was killed, made out a *prima facie* case of negligence on the part of the company, which it must meet by proof that the wire was down through no fault of its servants or agents. See 37 AM. LAW REG. N. S. 584, where the cases on the subject are collected.

Highways, Defects Therein

The question frequently arises as to what degree of safety a pedestrian may assume to exist in the public highways and the sidewalks thereof, without acting at his or her peril. The Supreme Court of New York holds that, where a sidewalk consists of a strip of flagstones three feet wide, with a growth of high grass on each side, a pedestrian may, to avoid an obstacle on the flags, step through the high grass to reach the street, without being guilty of contributory negligence in falling into a hole concealed by the high grass: *Leaverdure* v. *Mayor, Etc., of N. Y. City*, 50 N. Y. Suppl. 882.

Structure Attractive to Children, Injury, "Turntable Cases"

The question involved in those cases which are now well known under the title of the "Turntable Cases" has been recently decided by the Court of Errors and Appeals of New Jersey. A turntable, belonging to the defendant corporation and located on the land of the latter, was left unguarded and was used as a play-ground by the children of the neighborhood, one of whom, plaintiff, was injured while playing there.

NEGLIGENCE (Continued).

The court held that the defendant could not be said to have "allured" the children there, and was, therefore, under no more obligation to supply a safe place for them than it would be bound to afford protection to an adult trespasser, so it was therefore not liable: *D. L. & W. R. R.* v. *Reich*, 40 Atl. 682. The language of Mr. Jeremiah Smith, ex-Justice of the Supreme Court of New Hampshire, in an able article on the subject, 11 *Harvard Law Review* 449, was quoted with approval. Dixon, Ludlow and Krueger, JJ., dissented.

This question has arisen many times and a recovery has often been allowed upon a similar state of facts: *R. R.* v. *Stout*, 17 Wall. 657 (1872); *Keffe* v. *R. R.*, 21 Minn. 207 (1875); *Koons* v. *R. R.*, 65 Mo. 592 (1877); *R. R.* v. *Fitzsimmons*, 22 Kan. 686 (1879); *Ferguson* v. *R. R.*, 75 Ga. 637 (1885); *Barrett* v. *R. R.*, 91 Cal. 296 (1891); *Walsh* v. *R. R.*, 67 Hun, 604 (Sup. Ct. N. Y. 1893). But in many jurisdictions the railroads have been held not liable, and the better rule seems to have been laid down in the principal case: *Frost* v. *R. R.*, 64 N. H. 220 (1886); *Daniels* v. *R. R.*, 154 Mass. 349 (1891); *Walsh* v. *R. R.*, 145 N. Y. (1895), (reversing *Walsh* v. *R. R.*, 68 Hun, 604); *Turess* v. *R. R.*, 40 Atl. (N. J.) 614 (1898).

PLEADING AND PRACTICE.

An action was brought in equity which was demurred to and the demurrer sustained because of misjoinder of parties. The point of law was subsequently fully explained in another case, which was affirmed on appeal. Notwithstanding that it was thus shown that the complainant had misconceived his cause of action, he filed an amended bill in equity, which was defeated by a demurrer, and the demurrer sustained on appeal. Again, he filed a bill in equity which was defeated as before. At last, four years from the time of filing the original bill, the plaintiff asked permission to amend and substitute an action at law. The court, on appeal, disposed of the motion. "Having thus, in defiance of our judgment, twice rendered, again adhered to his original position, surely he must now stand or fall by that position. . . . He does not claim to have been misled as to the facts. After four years of successful defence to the equitable action, the defendants should not now be called upon in the same action to meet a host of entirely new and distinct causes of action at law:" *Higgins* v. *Gedney*, 52 N. Y. Suppl. 331.

Amendment, Loss of Right Thereto

REAL PROPERTY.

Building on Division Line, Right of Removal, Easements

In *Whyte* v. *Builders' League of New York*, 52 N. Y. Suppl. 65, a peculiar state of facts was presented, raising a question in the law of easements. A, the owner of two adjoining lots, built three houses thereon, the middle one being one-half on the lot now owned by the plaintiff and one half on the lot now owned by defendant. A common sewer ran along the line between the two lots; the entrance to the middle house was on the defendant's lot and the water supply also came through the same lot. On A's death a partition was made and the defendant and plaintiff each became the owner of one lot. The defendant took down all that part of the middle house which stood on his lot, destroying the water supply and sewer connection to the remaining half. Plaintiff brings this bill to compel a restoration of that part of the house removed and to recover damages.

The court admitted the existence of the rule that an owner conveying part of his lands impliedly grants all apparent easements used and necessary for the benefit of the part granted, such as water supply from a spring, but concluded that a different rule applies here. "No case has been found," said the court, "which declares the use of a building erected on two adjoining lots to be a common servitude for both." The division of title separated the interest into single interests "to be disposed of at pleasure."

Owner of Land, Public Way, Duty of Repair

Defendant was the owner of two fields, across which ran a path used by the public. Defendant and his predecessors in title had occasionally repaired a stile on the path, but the stile fell out of repair and plaintiff, while crossing it, was injured. On suit against defendant the Court of Queen's Bench Division held that the mere fact that defendant had repaired the stile was no evidence of the fact that he was liable to repair it *ratione tenurae*, since it was probable that the repairs were made for defendant's own benefit: *Rundle* v. *Hearle* [1898], 2 Q. B. 83.

RECEIVERS.

Power to Make Contracts, Loss of Profits

The power of a receiver to make contracts was fully discussed in the N. Y. Supreme Court in *In re Punnet Cycle Mfg. Co.*, 53 N. Y. Suppl. 204. The receiver of the Shipman Engine Mfg. Co. had authority given him by the court to carry on the business "and make up and dispose of the goods and articles

RECEIVERS (Continued).

made by said corporation, and such goods and articles as he can manufacture with its plant at a profit, for such period of time as to him seems beneficial to the creditors and stockholders of such corporation." He entered into a contract to supply the Punnet Cycle Co. with 2500 sets of bicycle parts, but before it was completed the Cycle Co. failed and went into the hands of a receiver. The receiver of the vendor thereupon sought to recover damages for goods manufactured, but not delivered, and also for loss of prospective profits on goods ordered but not manufactured. The referee allowed the former claim, but disallowed the claim for profits, and in confirming the report the court held that the grant of powers of the receiver of the Shipman Co. did not authorize such a contract; that he could not agree to deliver a specified quantity of goods in a specified time, since a breach of such a contract would render the estate liable to damages. "If at any time it should become unprofitable, he was required to cease manufacture, or he could have been required to stop. He could not by any contract for the making and delivery of goods in the future, subject the property in his hands to the risks and vicissitudes of trade." It is respectfully submitted that such an interpretation practically ties the receiver's hands and ends the business.

RES JUDICATA.

The House of Lords of England has recently reiterated the rule that when a question of law is decided by the House, it cannot be departed from a subsequent hearing of the case, even though it may have been erroneous. The only remedy is by Act of Parliament: *London, Etc., Co.* v. *London City Council* [1898], A. C. 375.

House of Lords, Decision, Conclusiveness

In this case the only question argued was as to the power of the House to reconsider previous decisions of its own, and, if it thought the decisions wrong, to overrule and depart from them in subsequent cases; which question was decided in the negative. The facts of the case were not discussed. However, if the previous decision had been based on a mistake of *fact*, such as the application of an Act of Parliament which had been repealed, then the Lords would not be bound by their former decision, but might decide the case on the correct facts. Per Halsbury, L. C., *ibid*, p. 380.

SALES.

A, the agent of a cash-recorder company, induced B to buy one of their machines, it being agreed between them that the machine could be returned if not satisfactory, without payment. Thereupon A made out a written "order," saying it contained their agreement, and B signed without reading. As a matter of fact nothing was said in the "order" about the privilege of return without payment. On suit for the price, defendant proved the above facts and his return of the machine. Plaintiff contended that the vendee was under an obligation to read the written contract before signing and was bound thereby, but the court decided he had a right to rely on A's statement that the writing contained their agreement: *Hough* v. *Cash-Recorder Co.*, 51 N. Y. Suppl. 1134.

Oral Representations, Written Contract, Duty to Read

STATUTE OF LIMITATIONS.

An Ohio statute (Rev. Stat. § 2859) provides that, "When any personal taxes shall stand charged against any person, and the same shall not be paid within the time prescribed by law, ... the treasurer of such a county . . . . is hereby authorized and empowered to enforce the collection by a civil action in the name of the treasurer of such county against such person for the recovery of such taxes." In an action brought under this statute for unpaid taxes the statute of limitations was pleaded.

Running Against State, Party in Interest

The Supreme Court of Ohio held that the general rule, that the statute of limitations does not run against the state, was applicable in this case, since, although the state was not a party to the record, it was the real party in interest: *Wasteney* v. *Schott*, 51 N. E. 34. In cases where the state is a mere nominal party, the rule is different: *Hartman* v. *Hunter*, 56 Ohio, 175 (1897).

TRADE-NAME.

Plaintiff opened a store for the purpose of dealing in general merchandise, and extensively advertised it by signs and through the newspapers as the "Nickle Store." An injunction as asked for to restrain defendant from maintaining a store of the same character directly opposite, bearing a large sign—"Nickle Store." Held, that the injunction would issue, since the trade-name was unique

"Nickle Store," Injunction

TRADE NAME (Continued).

and not descriptive of the business carried on. But if plaintiff had been a dealer in the metal, nickel, or had kept one of those stores commonly known as "five cent stores," where the majority of articles may be purchased for a "nickel," a court of equity would not interfere: *Duke* v. *Cleaver*, 46 S. W. (Tex.) 1128.

TRUSTS.

Property was left to the presiding bishop of the Church of Latter-Day Saints, "to receive it in trust, to expend the annual interest or income, according to his discretion, for the benefit of the members of the Church of Jesus Christ of Latter-Day Saints, whether it be for public schools, parks, watering cities, acclimatizing foreign plants or anything else whereby the members may be benefited." The devise was attacked on the ground that it violated the rule against perpetuities.

Charitable Trust, Beneficiaries, Proper Designation

Held, (1) that the specific objects of the trust, viz., public schools, etc., were of a charitable nature and formed the basis of a charitable trust, and (2) that although the phrase, "or anything else whereby the members may be benefited," was of itself broad enough to include non-charitable things, yet the court, in order to sustain the trust, would restrict its operation to the charitable objects named above: *Staines* v. *Burton*, 53 Pac. (Utah) 1015. (See note in this issue.)

In *Dunlap* v. *Gill*, 51 N. Y. Suppl. 265, it appeared that one Whitworth devised property as follows: "I give and devise to Mary Ely, otherwise called Mother Jerome, all the real estate of which I am seized, . . . to have and hold the same to her, her heirs and assigns forever. My purpose in making this devise is to devote the same to the object of a hospital under the charge of the Sisters of Charity, but in expressing this purpose I do not desire to create any trust in law affecting said premises, willing as I am to confide unreservedly in the honor and conscience of said devisee." During her life the donee always treated the property as the property of the Sisterhood, the taxes were paid by the Order, and finally it was exempted from taxation as the property of a charitable institution. On the death of Mary Ely, a claim having been made by her heirs, it was held that she had

Gift to Religious Use, Implied Trust, Estoppel of Heirs of Trustee

TRUSTS (Continued).

treated herself as trustee and impressed the estate with the character of trust property, notwithstanding the words of the will, and that consequently the heirs were estopped by the acts of their ancestor.

TURNPIKES.

A statute of New Jersey (P. L. 1851, p. 177) authorizes a turnpike company to collect toll for the passage of, *inter alia*, "carriages of burden or pleasure" along the pike, and it further enacts that the rate shall be, "For every carriage, sleigh, or sled drawn by one beast, one cent, for every additional beast one cent." This action was brought by the turnpike company against a bicycle rider who refused to pay toll for riding on the pike.

Bicycle, Toll, "Carriage of Pleasure"

The Supreme Court of New Jersey held that a bicycle was not a "carriage of pleasure" under the statute, taking into consideration the reference to being "drawn by beasts." "A bicycle ridden by a human being no more comes within this description than a wheelbarrow drawn by a man, or a perambulator pushed by a nurse maid:" *G. & S. Turnpike Co.* v. *Leppee*, 40 Atl. 681. *String* v. *C. & B. Turnpike Co.*, 40 Atl. (N. J. Ct. of Chan.) 774 (1898), accord.

WILLS.

In *Root's Estate*, 40 Atl. 818, there was a devise, "Unto my nephew, William Root, the legacy or sum of one thousand dollars." Evidence was offered to show that, although the testator had a nephew, William Root, yet his wife had a nephew of the same name, and that the testator showed more affection for the latter than for his own nephew, and had expressed the intention of making a legacy in his favor. The Supreme Court of Pennsylvania held that there was no latent ambiguity and that the evidence was inadmissible.

Latent Ambiguity, Parol Evidence

The decision was based upon the ruling in *Appel* v. *Byers*, 95 Pa. 479 (1881), where a devise was made "to my nephew, P. B.," the testator having two nephews, one legitimate, the other illegitimate. Evidence that the testator meant the illegitimate nephew was excluded. The contrary was held in *In re Ashton* [1892], Prob. 83, and *Powell* v. *Biddle*, 2 Dall. 70 (1790).